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No. 94-1150

Supreme Court, U.S.
FILED
FEB 6 1995
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

ALSTON R. KEENER,

Petitioner,

v.

EXXON COMPANY, USA, and EXXON CORPORATION,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

In their brief in opposition, respondents (collectively "Exxon") assert that Keener has mischaracterized the presumption that the Fourth Circuit panel majority created and employed to affirm the district court's grant of summary judgment in Exxon's favor. *See* Br. in Opp. 8-9.

Keener respectfully submits this reply to demonstrate that it is Exxon, and not Keener, that has mischaracterized the presumption. The presumption as inaccurately portrayed by Exxon is contrary to the Fourth Circuit panel majority's opinion and is absurd.

Exxon has failed to argue in its brief in opposition that the presumption, as understood by Keener, does not give rise to a conflict among the circuits. Additionally, Exxon has failed to argue that the presumption, as understood by Keener, does not vitiate Congress's express presumption of oil company noncompliance with the Petroleum Marketing Practices Act and substitute the directly opposite presumption of oil company compliance.

Thus, if the Court believes that it is Keener, and not Exxon, who has accurately portrayed the presumption that the Fourth Circuit panel majority actually employed, then it is appropriate to treat this as a case in which the existence of the prerequisites for review in this Court is undisputed.

ARGUMENT

Exxon, Rather Than Keener, Has Mischaracterized The Presumption Employed Below

Keener explained in his petition that the Fourth Circuit panel majority created and employed the "strong presumption" that an oil company has satisfied its obligation under the PMPA to extend a "right of first refusal," *see* 15 U.S.C. §2802(b)(3)(D)(iii)(II), anytime the price term of an offer to sell the premises to the nonrenewed franchisee is the same as the price term contained in a third party's bid, even where, as here, the third party's bid

covered items in addition to the premises. *See* Pet. for Cert. 14-15.[1]

Keener also explained, *see* Pet. for Cert. 15-16, that the Fourth Circuit's presumption directly conflicts with rulings of the Second and Ninth Circuits, which have held that a valid PMPA right of first refusal must contain *both* the same price *and* the same other terms and conditions found in a third party's bid. *See Ellis v. Mobil Oil*, 969 F.2d 784 (CA9 1992); *Atlantic Ave. Oil & Gas, Ltd. v. Texaco Ref. & Mktg. Inc.*, 870 F.2d 93 (CA2 1989) (per curiam), *aff'g* 699 F. Supp. 27 (E.D.N.Y. 1988).

Attempting to dispel the existence of this circuit split, Exxon contends that Keener misunderstands the presumption that the Fourth Circuit panel majority employed to affirm the summary judgment that the district court entered in Exxon's favor. Exxon maintains that the Fourth Circuit panel majority merely created a presumption that where the "same property" is offered to a nonrenewed franchisee for the "same price" that a third party has bid, a valid PMPA right of first refusal has been

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[1] In applying the "strong presumption" of statutory compliance, the Fourth Circuit panel majority acknowledged that evidence in the record supported Keener's assertion that what DeFazio purchased for $1.2 million differed from what Exxon had offered to Keener in exchange for that price. *See Keener v. Exxon Co., USA*, 32 F.3d 127, 131 (1994); App. to Pet. for Cert. 9a. Nevertheless, the "strength" of the panel majority's judge-made presumption proved sufficient to overcome both that evidence of Exxon's statutory noncompliance and Congress's express statutory presumption, set forth in section 105(c) of the PMPA, 15 U.S.C. §2805(c), of petroleum franchisor noncompliance with the PMPA.

extended. *See* Br. in Opp. 9 ("In short, the presumption of statutory compliance adopted by the Fourth Circuit fully recognizes that there must be a 'same price, same property' right of first refusal to satisfy the requirements of the PMPA.").

It is Exxon, not Keener, that mischaracterizes the presumption that the Fourth Circuit panel majority actually employed. In its opinion, immediately following the sentence in which the panel majority first mentioned its presumption, the panel majority wrote: "This presumption that a same price offer evidences statutory compliance reflects the recognition that claims such as Keener's intrude upon normal business operations once filed." *Keener v. Exxon Co., USA*, 32 F.3d 127, 131 (CA4 1994); App. to Pet. for Cert. 8a. Thus, in the panel majority's own words, it created a "presumption that a same price offer evidences statutory compliance" with the PMPA's right of first refusal requirement. *Id.* Exxon's assertion to the contrary is wrong, and thus it is Keener who has accurately portrayed the presumption.

Judge Murnaghan, in dissent, understood the majority's presumption in exactly the same way as Keener. Judge Murnaghan wrote: "The majority avoids [reversal of the district court's judgment] by creating out of whole cloth a 'strong presumption' that, whenever two offers contain the same purchase price, a valid right of first refusal has been extended – *regardless of whether the same items were being purchased at that price.*" 32 F.3d at 133 (Murnaghan, J., dissenting) (emphasis added); App. to Pet. for Cert. 15a. Had the panel majority believed that Judge Murnaghan misunderstood the presumption, it almost certainly would have said so. But although the

panel majority and Judge Murnaghan disagreed over the advisability of such a presumption, the panel majority did not once suggest that Judge Murnaghan misunderstood or mischaracterized the actual presumption that the panel majority created and employed in affirming the grant of summary judgment against Keener. Accordingly, it is Exxon, and not Keener or Judge Murnaghan, that has inaccurately portrayed the panel majority's presumption.

Furthermore, the presumption as Exxon would have this Court understand it is absurd. It is indisputable that a valid right of first refusal under the PMPA exists where *both* the same price *and* the same other terms and conditions contained in a third party's bid are extended to the nonrenewed franchisee. An oil company that established that it extended to its nonrenewed franchisee both aspects of a valid right of first refusal would be entitled to *more* than just a *presumption* that the law had been satisfied; in such a situation, the oil company would be entitled to prevail as a matter of law.

The presumption as Exxon would have this Court understand it suffers from the same absurdity as the following statement: "In a negligence action brought in a jurisdiction where contributory negligence operates as an absolute bar to recovery, a defendant, upon establishing that the plaintiff was contributorily negligent, is entitled to a presumption that the defendant should prevail." In this hypothetical and in Exxon's misdescription of the Fourth Circuit panel majority's ruling, it is absurd to employ a presumption because, in both instances, upon establishing all aspects of an affirmative defense, the defendant would be entitled to judgment as a matter of

law.[2] Thus, the presumption as Exxon understands it is absurd.

Exxon also overlooks the panel majority's explanation that the purpose of its presumption was to make the PMPA's right of first refusal provision easier to apply. *See* 32 F.3d at 131 & n.3; App. to Pet. for Cert. 8a-9a & n.3. The presumption as Exxon misunderstands it does not make the PMPA's right of first refusal provision any easier to apply, because, to be entitled to Exxon's version of the presumption, an oil company must still prove all that the statute requires to establish an affirmative defense: that both the same price and the same other terms and conditions of a third party's bid were offered to the nonrenewed franchisee. The panel majority expressly intended to employ its presumption to lessen an oil company's evidentiary burden. The presumption as misunderstood by Exxon does not square with the majority's stated intention; however, the presumption as accurately understood by Keener and Judge Murnaghan serves the majority's intent.

Exxon does not deny that the Fourth Circuit's decision, as understood by Keener and Judge Murnaghan, involves a matter of utmost importance to thousands of petroleum franchisees, and to other holders of statutory rights of first refusal, as to which the courts of appeals

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[2] If, as Exxon claims, what Keener and Judge Murnaghan understand to be the "presumed" fact was instead a "basic" fact, then the panel majority would have had no need to create the presumption. The presumption was needed to sidestep the district court's improper factal "finding" on summary judgment that all the terms of both offers were identical.

are in conflict. Exxon also does not dispute that the Fourth Circuit's decision, as understood by Keener and Judge Murnaghan, provides an opportunity for this Court to explain that where Congress has expressly established a presumption, a court may not override Congress and establish – through an unprincipled act of judicial legislation – a directly opposite presumption.

In sum, other than by misstating to the point of absurdity the Fourth Circuit panel majority's presumption, Exxon's brief in opposition has done nothing to dispel the many persuasive reasons that Keener and his amici have placed before the Court in favor of granting review.

CONCLUSION

For the foregoing reasons and those previously stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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